

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

TROI MAYER,

Petitioner

v.

**THOMAS CORBETT,
GWENDOLYN T. MOSLEY,**

Respondents

CIVIL NO. 1:CV-05-1217

MEMORANDUM AND ORDER

Before the court is a report of the magistrate judge in which he recommends that the petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241 be dismissed without prejudice to Petitioner to file a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has filed objections to the magistrate judge's report and recommendation. He has also filed a motion for an extension of time to file objections to the report and recommendation. The motion for extension of time was filed on November 18, 2005. The objections to the report and recommendation were filed on December 1, 2005. The court will deem the objections timely filed; therefore, the motion for extension of time will be deemed moot.

Petitioner is challenging his custody by state officials. A state prisoner may only challenge his conviction and sentence through a petition filed pursuant to

28 U.S.C. § 2254. *Coady v. Vaughn*, 251 F.3d 480 (3d Cir. 2001). Petitioner is challenging his custody by state officials. He asserts that on July 18, 2002, a judge, pursuant to a Post Conviction Relief Act (“PCRA”) proceeding, granted him a new trial. He claims he is being illegally detained as he has not been retried. However, he also asserts that the Pennsylvania Superior Court vacated the PCRA court’s order for a new trial. Thus, at the present time, he is still in custody and the appropriate form of relief is by way of petition pursuant to 28 U.S.C. § 2254.

The magistrate judge correctly notes that had the Superior Court’s order granted him a new trial and Petitioner was in custody awaiting retrial, a petition pursuant to 28 U.S.C. § 2241 might have merit. (Report and Recommendation at p. 6 n.1.)

IT IS THEREFORE ORDERED THAT:

1) Petitioner’s objections to the report and recommendation are deemed timely filed and, therefore, the motion for extension of time to file objections to the report and recommendation (doc. 23) is deemed moot.

2) The court adopts the report and recommendation (doc. 21) of Magistrate Judge Smyser.

3) The petition filed pursuant to 28 U.S.C. § 2241 is dismissed without prejudice to the petitioner filing a petition pursuant to 28 U.S.C. § 2254, provided the requirements of 28 U.S.C. § 2244(b) are met.

4) Petitioner’s “Motion for Conformity” (doc. 18) is denied.

5) Petitioner's "Motion to Update the Court on the Status of the Third Circuit's Decision and to Seek Clarification and/or Direction of the Court" (doc. 20)¹ is denied.

6) This court declines to issue a certificate of appealability.

7) The Clerk of Court shall close the file.

s/Sylvia H. Rambo
SYLVIA H. RAMBO
United States District Judge

Dated: December 2, 2005.

¹Petitioner makes references throughout his objections to the report and recommendation of the case numbers 05-2300 and 05-3945. These are court of appeals numbers related to cases from the Eastern District of Pennsylvania, not the Middle District of Pennsylvania.